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NO. 88-6801

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1988

DAVID LEE POWELL,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court's remand order "subject[ed] only [the] secondary reliance [of the Court of Criminal Appeals] on the harmless error analysis of Satterwhite v. Texas, ___ U.S. ___, 108 S.Ct. 1792 (1988), to renewed review" and did not address, and left undisturbed, the State court's "initial determination of no [Estelle v.] Smith error, as well as the remaining holdings of [the] original opinion."

II. Whether Powell waived his Fifth and Sixth Amendment rights against self-incrimination and to the assistance of counsel, in violation of this Court's ruling in Estelle v. Smith, 451 U.S. 454 (1981), by presenting, at the guilt stage of the trial, expert psychiatric testimony to support his affirmative defense of insanity; did this "waiver" permit the state to adduce psychiatric testimony at the punishment phase of the trial on the issue of future dangerousness where such testimony was based on a pre-trial competency and sanity examinations conducted without the warnings and notice required by Estelle v. Smith, supra, and where Powell presented no psychiatric testimony on that issue.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion on remand from this Court of the Texas Court of Criminal Appeals affirming Powell's capital murder conviction is not yet reported and is attached to the petition for writ of certiorari as Appendix A.

JURISDICTION

Powell seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

[1]For clarity, Petitioner shall be referred to herein as "Powell" and Respondent as "the state."

CONSTITUTIONAL PROVISIONS INVOLVED

Powell bases his claims on the Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The state has custody of Powell pursuant to a judgment and sentence of the 167th Judicial District Court of Travis County, Texas. Powell was indicted on June 29, 1978, for the capital murder of Ralph Ablanedo, a peace officer acting in the lawful discharge of an official duty. Upon Powell's plea of not guilty, trial before a jury commenced on September 21, 1978, and Powell was found guilty of the capital offense on September 27, 1978. After a separate hearing on punishment, the jury on September 28, 1978, affirmatively answered the two special issues submitted pursuant to Tex.Code Crim.Proc.Ann. art. 37.071 (Vernon Supp. 1987). Accordingly, a death sentence was imposed.

Powell's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. On July 6, 1987, that court affirmed the conviction and sentence, and the court denied leave to file motion for rehearing on October 28, 1987. Powell v. State, 742 S.W.2d 353 (Tex.Crim.App. 1987). Powell then filed a petition for writ of certiorari in this Court, which was granted on June 30, 1988, vacating the judgment and remanding the case to the Court of Criminal Appeals for further consideration in light of Satterwhite v. Texas, 486 U.S. ___, 108 S.Ct. 1792 (1988).

On remand, the Court of Criminal Appeals, finding no error under Estelle v. Smith, 451 U.S. 454 (1981), reaffirmed Powell's conviction and sentence.

STATEMENT OF FACTS

The facts surrounding Powell's commission of capital murder are comprehensively set forth in the opinion of the court below, Powell v. State, 742 S.W.2d at 354-56.

SUMMARY OF ARGUMENT

This case presents no important issue worthy of this Court's certiorari jurisdiction.

There was no constitutional violation in allowing the state to present the testimony of a psychiatrist and psychologist on the issue of future dangerousness during the punishment phase of Powell's trial. During the guilt-innocence phase of his trial, Powell raised an insanity defense and presented psychiatric testimony in support of the claim. Because this evidence was also before the jury in the punishment phase of the trial, the state was properly permitted to introduce the psychiatric testimony in question to rebut Powell's evidence.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Powell has advanced no special or important reason in this case, and none exists.

II.

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO INTRODUCE PSYCHIATRIC TESTIMONY DURING THE PUNISHMENT PHASE OF POWELL'S TRIAL.

In his only substantive ground for relief, Powell asserts that the trial court erred in admitting during the punishment phase of trial, over objection, the testimony of two psychiatrists who gave their expert opinions of a likelihood that Powell would commit acts of violence in the future that would constitute a continuing threat to society. Specifically, he asserts that because neither doctor informed Powell of his right to remain silent and that results of the examination would be used against him in the sentencing phase of trial, nor was counsel informed that the scope of the examination would include Powell's "future dangerousness," see Tex.Code Crim.Proc.Ann. art. 37.071(b)(2) (Vernon Supp. 1989), the testimony was admitted in violation of Powell's Fifth and Sixth Amendment rights, as set forth by the Court in Estelle v. Smith, 451 U.S. 454 (1981).

In this case, Powell presented testimony from a psychiatrist derived from psychiatric evaluations during the guilt-innocence phase of his trial in support of an insanity defense. The state responded with its own psychiatric testimony which suggested Powell was not insane at the time of the offense. After Powell was found guilty, a separate punishment hearing was held in which the state presented psychiatric testimony concerning the likelihood that Powell would commit criminal acts of violence in the future. The state then recalled Drs. George Parker and Richard Coons, who opined that, based upon a hypothetical fact situation identical to Powell's and upon their mental examination of Powell, there was a likelihood that Powell would commit future violent acts. The defense presented no psychiatric testimony during this punishment phase of the trial.

In Smith, this Court held that under certain circumstances a defendant's Fifth and Sixth Amendment rights are violated when the state introduces psychiatric testimony in the punishment phase of a capital murder proceeding. In Smith, the trial court appointed a psychiatrist to interview the defendant to determine whether he was competent to stand trial. Defendant's counsel was not informed that the interview would take place, nor did the psychiatrist give the defendant the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). At trial, the defendant neither raised an insanity defense nor presented any psychiatric testimony. After the defendant was found guilty of capital murder, a separate punishment hearing was held, in which the jury was asked to answer two special issues. During this hearing, the state introduced the testimony of the examining psychiatrist on the second special issue of "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann. art. 37.071(b)(2) (Vernon Supp. 1987). This Court held that the introduction of such testimony violated the defendant's Fifth Amendment right against self-incrimination. 451 U.S. at 466-69. This Court also held that because counsel had

been previously appointed for the defendant, yet was not notified in advance that the examination would relate to the issue of future dangerousness, counsel was unable to effectively consult with the defendant, thus violating the defendant's Sixth Amendment right to counsel. Id. at 469-71.

Fifth Amendment

In Smith, however, the Court also suggested that under other circumstances such testimony would be properly admitted. For instance, the Court noted that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." Id. at 468. The obvious implication of the Court's statement is that if the defendant does initiate the examination or attempt to introduce psychiatric testimony, the defendant could be compelled to submit to an examination by the state's psychiatrist and the results of that examination could be admitted against him at trial. The Court has so held in Buchanan v. Kentucky, ___ U.S. ___, ___, 107 S.Ct. 2906, 2917-18 (1987), wherein it stated:

> if a defendant requests such an [psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

(emphasis added). Accordingly, if a defendant presents the testimony of a psychiatrist in support of an insanity defense, the Fifth Amendment does not preclude the state from responding with testimony of its own psychiatrist. Likewise, if a defendant presents psychiatric testimony at a punishment hearing, the state may respond.

Powell contends that the reasoning of Smith and Buchanan are not controlling in this case, because the testimony presented by the state at the punishment hearing was not in response to the insanity defense raised at the guilt-innocence phase of the

trial. According to Powell, the waiver of his Fifth Amendment rights was limited to the insanity defense issue. Thus, while the state could respond to that testimony with the results of the unwarned psychiatric interview, Powell contends that it could not use the conclusions from the interview at the punishment phase of the trial to develop the future dangerousness issue.

In Texas, however, all evidence which is presented during the guilt-innocence phase of a capital murder trial is admitted during the punishment phase on the special punishment issues, see Powell v. State, 742 S.W.2d 353, 359 (Tex. Crim. App. 1987); Russell v. State, 665 S.W.2d 771 (Tex. Crim. App. 1983); Garcia v. State, 626 S.W.2d 46 (Tex. Crim. App. 1981), and Powell did not request otherwise. Accordingly, all evidence presented in support of Powell's sanity defense was readmitted at the punishment phase of the trial and could be used to suggest Powell would not be a future danger. It was therefore proper for the trial court to allow the testimony of the state's psychiatrists concerning Powell's future dangerousness.

Moreover, Powell's assertion that his evidence dealt exclusively with the guilt issue of his sanity, as opposed to the punishment issue of his future dangerousness, is simply incorrect. In addition to the fact that counsel deemed such evidence sufficiently relevant to the punishment issues that he requested a specific punishment instruction on such evidence, see Powell v. State, 742 S.W.2d at 358-59, during her questioning of the psychiatrist for the defense during guilt-innocence, counsel for defense went beyond establishing the issue of Powell's insanity. Counsel concluded her direct examination as follows:

> Q. All right. Is [Powell] likely to suffer from this illness for a long time, Doctor?
>
> A. Schizophrenia -- paranoid schizophrenia is one of the most resistant conditions to treatment. It doesn't mean that a person cannot maybe at some point recover, but it's one of the conditions that I would consider to be the least likely to be curable. It requires, in my judgment, indefinite confinement which should have occurred prior to this

> tragedy in this case. There was plenty of clinical evidence to justify confinement in an institution for Mr. Powell. However, in the recent past that is not possible until some tragedy occurs.

(SF X 2601).[2] In this question and response the defendant clearly went beyond merely establishing whether Powell was in fact insane, and instead raised the possibility of treatment or responses to the problem. Such questions inevitably involve a determination of Powell's propensity for dangerous acts in the future and means of dealing with that propensity. Having raised the issue, the defense could not then object to the state's presentation of psychiatric evidence on the issue.

The Court's decision in Buchanan flows logically from the fact that Smith's Fifth Amendment holding is rooted in Miranda v. Arizona, 384 U.S. 486 (1966), and its progeny. The procedures set forth in Miranda do not confer any constitutional rights but, rather, are designed to protect an accused's Fifth Amendment rights. Hence, the admission of unwarned but otherwise voluntary confessions for impeachment purposes does not violate the Fifth Amendment. Harris v. New York, 401 U.S. 222 (1971). Here, Powell offered evidence of his mental state, resulting from psychiatric examinations and interviews, at the guilt-innocence phase of trial. Moreover, Powell did not request that the jury be instructed to disregard this evidence during the punishment phase of trial to prevent the admission of such rebuttal. Indeed, Powell expressly requested that the evidence be considered by the jury during the punishment phase. Powell v. State, 742 S.W.2d at 358-59.[3] Thus, the state must be allowed to rebut Powell's psychiatric evidence with its own, and to hold otherwise

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[2]"R" refers to the record of Powell's trial, filed in the court below, with reference to volume and page number.

[3]This request, made prior to the presentation of evidence at the punishment phase of trial was unnecessary, as all evidence presented at guilt-innocence is automatically before the jury and to be considered by it during punishment as a matter of state law. Russell v. State, 665 S.W.2d 771 (Tex. Crim. App. 1983).

would allow Powell to use the Fifth Amendment as a license to present false or misleading evidence.

Sixth Amendment

Further, Powell's presentation of psychiatric testimony as evidence in mitigation of punishment precludes the interposing of a Sixth Amendment objection to the state's presentation of psychiatric evidence in rebuttal. Powell does not contend that he did not consult with counsel prior to submitting to a psychiatric examination. Moreover, by Powell's admission, his counsel was fully aware of the opinion in Smich v. Estelle, 445 F.Supp. 647, 664 (N.D. Tex.-Dallas 1977), in that he specifically referenced Smith in objecting to th introduction of the psychiatric evidence. (R XI 2974). In Smith, the district court stated, in pertinent part:

> A difficult problem of waiver is presented when the Defendant raises the insanity defense but is nevertheless found guilty. At the punishment stage may the jury consider the psychiatric evidence on sanity as a mitigating factor and, if so, may the state then introduce psychiatric testimony on dangerousness? Ordinarily the jury would be permitted to consider the Defendant's psychiatric evidence on sanity as a mitigating factor. If the Defendant intends to rely on this testimony at the punishment stage, he then waives his privilege against self incrimination and the State may have a psychiatrist examine the Defendant on the issue of dangerousness and introduce testimony on this issue before the jury.
>
> If, however, the Defendant does not wish to rely on his psychiatrist's insanity testimony at the penalty stage then the jury must be instructed to disregard the psychiatric testimony as a mitigating factor and the privilege against self incrimination may be asserted to forego either a compelled psychiatric examination on the issue of dangerousness or evidence from a court appointed or state psychiatrist on dangerousness learned from a sanity or competency examination.

In Buchanan, this Court recognized that Buchanan's counsel was undoubtedly aware of its previous holding in Smith and, thus, the Court presumed counsel effectively consulted with Buchanan. Here, the record affirmatively demonstrates that Powell's counsel was aware of the district court's ruling in Smith and the possibility that the psychiatrists would testify to the issue of

Powell's future dangerousness, as well as the ramifications of presenting psychiatric evidence. As in Buchanan, counsel must be presumed to have consulted with Powell on the advisability of submitting to an examination. See Buchanan v. Kentucky, ___ U.S. at ___ , 107 S.Ct. at 2918-19. Thus, Powell's Sixth Amendment claim fails.

Ever were the psychiatric evaluation performed by Drs. Parker and Coons in violation of the Sixth Amendment, Powell is not entitled to relief. Powell's election to present evidence of his mental status derived from a psychiatric evaluation as mitigating evidence at the punishment phase estops him from interposing a Sixth Amendment objection to the state's introduction of similar evidence in rebuttal. As noted by then Circuit Judge Scalia, the Sixth Amendment concerns addressed in Smith deal with a defendant's confrontation by the legal system. Thus, as in this case, significant decisions had to be made whether to raise an insanity defense, which would likely entail a court order to undergo psychiatric examination, whether to submit to the examination, and whether to introduce psychiatric testimony, which would have the effect of permitting the state to introduce psychiatric evidence in rebuttal. United States v. Byers, 740 F.2d 1104, 1118-19 (D.C. Cir. 1984).

In addition to those decisions above, Powell and his counsel, armed with knowledge of the potential dangers in presenting psychiatric evidence, made the significant decision to again confront the legal system by presenting psychiatric evidence as to his sanity and to present and urge the jury's consideration of his psychiatric evidence as mitigating evidence, knowing that the state could rebut the evidence with its own psychiatric evidence. Hence, because Powell, assisted by counsel, made the significant

decision to confront the legal system, any Sixth Amendment objection he may have had was waived.[4]

CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

[4]This Court recently granted certiorari in Michigan v. Harvey, ___ U.S. ___, 109 S.Ct. 1117 (1989), to consider a similar question: "May a defendant be impeached with a statement taken in violation of his Sixth Amendment right to counsel under Michigan v. Jackson, 475 U.S. 625 (1986)?"

THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 6, 1989

RECEIVED
JUN 6 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

The Honorable Joseph F. Spaniol, Jr.
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: David Lee Powell v. The State of Texas,
No. 88-6801

Dear Mr. Spaniol:

Enclosed for filing with the papers in the above styled cause are the original and nine typewritten copies of Respondent's Brief in Opposition. Also enclosed are the Proof of Service and Appearance of Counsel forms.

Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

By copy of this letter, one copy of said brief has been sent to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

ROBERT S. WALT
Assistant Attorney General
(512) 463-2080

RSW/kc
Enclosures

cc: Will Gray
Attorney at Law
16420 Park Ten Place
Houston, Texas 77084

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PROOF OF SERVICE

I hereby certify that on the ____ day of June, 1989, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Will Gray, Attorney at Law, 16420 Park Ten Place, Houston, Texas 77084. All parties required to be served have been served. I am a member of the Bar of this Court.

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ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 6th day of June, 1989.

NOTARY PUBLIC, State of Texas

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APPEARANCE OF COUNSEL

The Clerk will enter my appearance as counsel for the State of Texas which in this Court is Respondent. I certify that I am a member of the bar of the Supreme Court of the United States.

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